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On behalf of Plaintiff, Elizabeth Meloskie

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ELIZABETH MELOSKIE, Plaintiff, vs. RUBIN AND YATES, LLC; CEDRICK A. JORDAN a/k/a Cedric Jordan; JASON A. STROEHLEIN; and JOHN DOES 1-10 (fictitious names); Defendants.	Case 2:14-cv-00008-FSH-MAH **FIRST AMENDED CLASS ACTION COMPLAINT**

Plaintiff, Elizabeth Meloskie ("MELOSKIE"), individually and seeking to represent the class of all others who are similarly situated, by way of Complaint against Defendants, Rubin and Yates, LLC ("R&Y"), Cedrick A. Jordan also known as Cedric Jordan ("JORDAN"), Jason A. Stroehlein ("STROEHLEIN") and John Does 1-10 ("DOES") says:

I. NATURE OF THE ACTION – DEFENDANTS' "FOTI" VIOLATIONS

1. This action stems from Defendants' conduct when attempting to collect debts by leaving telephonic voice messages without disclosing information required by the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692 *et seq*. Such violations of the FDCPA are sometimes called "Foti" violations based on *Foti v. NCO Financial Systems, Inc.*, 424 F. Supp. 2d 643 (S.D.N.Y. 2006). *See*, *Nicholas v. CMRE Financial Services, Inc.*, 2010 WL 1049935,2010 U.S. Dist. LEXIS 25373 (D.N.J. Mar. 16, 2010) (Cavanuagh, J.), and, *Krug v Focus Receivables Management LLC*, 2010 WL 1875533, 2010 U.S. Dist. LEXIS 45850 (D.N.J. May 11, 2010) (Irenas, J.).

II. PARTIES

2. MELOSKIE is a natural person.

3. At all times relevant to the factual allegations of this Complaint, MELOSKIE was a citizen of the State of New Jersey, residing in Sussex County, New Jersey.

4. At all times relevant to the factual allegations of this Complaint, R&Y is a for-profit limited liability company of the State of New York with its principal business location at 5334 Transit Road, Suite 7, Depew, Erie County, New York and, according to the records from the New York Secretary of State, its registered agent is Ralph C. Lorigo, Esq., 101 Slade Avenue, West Seneca, NY 14224.

5. R&Y is not registered to transact business in New Jersey.

6. JORDAN is a natural person.

7. At all times relevant to the factual allegations of this Complaint, JORDAN was an officer of R&Y regularly working at its principal office in Depew, New York. On information and belief, JORDAN is R&Y's CEO (Chief Executive Officer) and resides in a single-family house located in or near Buffalo, New York.

8. STROEHLEIN is a natural person.

9. At all times relevant to the factual allegations of this Complaint, STROEHLEIN was an officer of R&Y regularly working at its principal office in Depew, New York. On information and belief, STROEHLEIN is the R&Y's Vice President of Operations and resides in a single-family house located in Depew, New York.

10. Each of the DOES is a natural person whose name is not presently known who controlled the activities of R&Y with respect to adopting and implementing its policies and practices to be followed by its employees with respect to leaving telephonic voice messages in R&Y's attempt to collect debts.

III. JURISDICTION AND VENUE

11. Subject matter jurisdiction of this Court arises under 15 U.S.C. § 1692k(d) and

28 U.S.C. § 1331.

12. Venue is appropriate in this federal district pursuant to 28 U.S.C. § 1391 because the events giving rise to MELOSKIE's claims occurred within this federal judicial district.

IV. LEGAL BASIS FOR FAIR DEBT COLLECTION PRACTICES ACT CLAIMS

First. The FDCPA "was passed to promote ethical business practices by debt collectors." *Sullivan v. Equifax, Inc.*, CIV.A. 01-4336, 2002 WL 799856 (E.D. Pa. Apr. 19, 2002). The Act was necessary because existing consumer protection laws were inadequate as demonstrated by abundant evidence of abusive, deceptive, and unfair debt collection practices by many debt collectors which contributed to the number of personal bankruptcies, marital instability, loss of jobs, and invasions of individual privacy. 15 U.S.C. §§ 1692(a) and 1692(b). Thus, Congress adopted the FDCPA with the "express purpose to eliminate abusive debt collection practices by debt collectors, ***and*** to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged." *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 130 S. Ct. 1605, 1623, 176 L. Ed. 2d 519 (2010) (internal quotes and ellipsis omitted; emphasis added); 15 U.S.C. § 1692(e).

Second. The Act is not concerned with whether the consumer owes the debt. "Congress recognized that 'the vast majority of consumers who obtain credit fully intend to repay their debts. When default occurs, it is nearly always due to an unforeseen event such as unemployment, overextension, serious illness or marital difficulties or divorce.'" *FTC v. Check Investors, Inc.*, 502 F.3d 159, 165 (3d Cir. 2007). Nevertheless, "'[a] basic tenet of the Act is that *all* consumers, *even those who have mismanaged their financial affairs resulting in default on their debt*, deserve 'the right to be treated in a reasonable and civil manner.'" *FTC, supra,* 502 F.3d at 165 (emphasis added) quoting *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322, 1324 (7th Cir. 1997).

Third. The FDCPA is construed broadly so as to effectuate its remedial purposes and a debt collector's conduct is judged from the standpoint of the "least sophisticated consumer," *Brown v. Card Serv. Ctr*, 464 F.3d 450, 453n1 (3d Cir. 2006). In this way, "the FDCPA protects all consumers, the gullible as well as the shrewd." *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2d Cir. 1993). For example, a "debt collection letter is deceptive where it can be reasonably read to have two or more different meanings, one of which is inaccurate." *Id.* at 455.

Fourth. The "FDCPA is a strict liability statute" except where it expressly makes knowledge or intent an element of the violation. *Allen ex rel. Martin v. LaSalle Bank, N.A.*, 629 F.3d 364, 368 (3d Cir. 2011) (citing, in footnote 7, supporting authorities from the Second, Seventh, Ninth and Eleventh Circuits).

Fifth. Liability under the FDCPA arises upon the showing of a single violation. *Taylor v. Perrin, Landry, deLaunay & Durand*, 103 F.3d 1232, 1238 (5th Cir. 1997); *Bentley v. Great Lakes Collection Bureau*, 6 F.3d 60, 62-3 (2d Cir. 1993).

Sixth. Liability under the FDCPA is excused *only* when a debt collector establishes, as an affirmative defense, the illegal conduct was either "not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error," 15 U.S.C. § 1692k(c), or an "act done or omitted in good faith in conformity with any advisory opinion of the" Consumer Financial Protection Bureau, 16 U.S.C. § 1692k(e). Thus, common law privileges and immunities are not available to absolve a debt collector from liability under the FDCPA. See, *Heintz v. Jenkins*, 514 U.S. 21, (1995); *Allen ex rel. Martin v. LaSalle Bank, N.A.*, 629 F.3d 364, 369 (3rd Cir. 2011); and *Sayyed v. Wolpoff & Abramson*, 485 F. 3d 236, 232-233 (4th Cir. 2007).

Seventh. A debt collector who violates any provision of the FDCPA is liable for "additional damages" (also called "statutory damages") up to $1,000.00, and attorney's fees and costs. 15 U.S.C. § 1692k(a). The absence of actual damages is not a bar to such actions as "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n3 (1973). Indeed, Congress, through "the FDCPA[,] permits and encourages parties who have suffered no loss to bring civil actions for statutory violations." *Jacobson, supra,* 516 F.3d at 96 (emphasis added).

Eighth. The FDCPA also provides for class relief "capped" at the lesser of $500,000 or 1% of the debt collector's net worth. 15 U.S.C. § 1692k(a)(2)(B). "Representative actions, therefore, appear to be fundamental to the statutory structure of the FDCPA." *Weiss, supra,* 385 F.3d at 345. Indeed, while limiting class relief, Congress nevertheless recognized the effectiveness of class actions to enforce the FDCPA and, therefore, mandated that a class action should be maintained "without regard to a minimum individual recovery." *Id.* When a debt collector opposes class certification based on its minimal or negative net worth, "there is a chance that no claims would proceed against Defendants due to a lack of financial incentive, thereby leaving unpunished allegedly thousands of FDCPA violations. This is exactly the kind of result Congress intended to avoid through the creation of the class action form." *Barkouras v. Hecker*, 2006 WL 3544585, 2006 U.S.Dist.Lexis 88998 (D.N.J. Dec. 8, 2006).

Ninth. "Congress also intended the FDCPA to be self-enforcing by private attorney generals [sic].” *Weiss v. Regal Collections*, 385 F.3d 337, 345 (3d Cir. 2004). “In order to prevail, it is not necessary for a plaintiff to show that she herself was confused by the communication she received; it is sufficient for a plaintiff to demonstrate that the least sophisticated consumer would be confused. In this way, the FDCPA enlists the efforts of sophisticated consumers like Jacobson as ‘private attorneys general’ to aid their less sophisticated counterparts, who are unlikely themselves to bring suit under the Act, but who are assumed by the Act to benefit from the deterrent effect of civil actions brought by others.” *Jacobson v. Healthcare Fin. Services, Inc.*, 516 F.3d 85, 91 (2d Cir. 2008); and, see, *Gonzales v. Arrow Fin. Services, LLC*, 660 F.3d 1055 (9th Cir. 2011).

V. FACTS

13. R&Y is regularly engaged in the collection of debts, its principal purpose is the collection of debts and, in attempting to collect debts, it uses instruments of interstate commerce such as the telephone to place calls from its office in New York to consumers in New Jersey and then leave voice messages for the consumers when the call is answered by an answering machine, voice mail or other automated telephone answering device.

14. R&Y’s debt collection business is reflected in its statements on its website, www.rubinandyates.com, which, among other things, states, “Rubin and Yates is a fully licensed New York state corporation of skilled and experienced professional/account managers, designated to manage purchased debt portfolios prior to pre-litigation and judgment.”

15. JORDAN is regularly engaged in the collection of debts.

16. On information and belief, in connection with R&Y’s business, JORDAN is R&Y’s chief executive officer and, in that capacity controls its collection activities including, but not limited to, the adoption and implementation of its policies and practices to be followed by its employees for leaving telephonic voice messages when calls are placed to collect a debt and are answered by an answering machine or a voice mail system. Thus, through the use of subordinates acting under his direction based on his control of R&Y’s collection activities, JORDAN uses telephones (which are an instrumentality of interstate commerce) in a business whose principal purpose is the collection of debts.

17. STROEHLEIN is regularly engaged in the collection of debts.

18. On information and belief, in connection with R&Y's business, STROEHLEIN is R&Y's Vice President of Operations and, in that capacity controls its collection activities including, but not limited to, the adoption and implementation of its policies and practices to be followed by its employees for leaving telephonic voice messages when calls are placed to collect a debt and are answered by an answering machine or a voice mail system. Thus, through the use of subordinates acting under his direction based on his control of R&Y's collection activities, STROEHLEIN uses telephones (which are an instrumentality of interstate commerce) in a business whose principal purpose is the collection of debts.

19. On information and belief, JORDAN and STROEHLEIN attended the 2012 DBA International Conference. See, www.dbainternational.org/events/past-events/2012AnnualConference attendees.pdf. According to its website, "DBA International is the nonprofit trade association that represents the interests of companies that acquire accounts receivable portfolios on the secondary market." See, www.dbainternational.org.

20. Each of the DOES is regularly engaged in the collection of debts.

21. On information and belief, one or more natural persons (whose identities are presently unknown and, until their identities are known, are referred to as DOES) controls or control R&Y's collection activities relating to the adoption and implementation of its policies and practices to be followed by its employees for leaving telephonic voice messages when calls are placed to collect a debt and are answered by an answering machine or a voice mail system. Thus, through the use of subordinates acting under each of the DOES's direction based on his or her control of R&Y's collection activities, each of the DOES uses telephones (which are an instrumentality of interstate commerce) in a business whose principal purpose is the collection of debts.

22. On information and belief, JORDAN, STROEHLEIN and/or DOES controlled, reviewed, supervised, directed, authorized, trained and/or implemented, for use by

R&Y's employees, R&Y's policies, practices and procedures regarding the content of telephonic voice messages left when calls placed to collect debts are answered by voice mail or an answering machine.

23. On February 5, 2014, an employee of R&Y who identified herself only as "Candace," left a voicemail message ("Message") for MELOSKIE in accordance with R&Y's policies and practices when a telephone call was placed to MELOSKIE's telephone using her number which has a "201" area code and was answered by her voice mail system. The Message stated:

> This message is intended for Elizabeth Meloskie. This is Candace calling from the firm of Rubin & Yates. We need to speak with yourself or counsel immediately regarding file number 149377. Please contact us at 1-855-276-3103. Thank you.

24. The Message was left at 1:01 PM on February 5, 2013 from Caller ID number 716-650-2640.

25. The Message did not state that the purpose of the call was to collect a debt.

26. The Message did not disclose that the caller is a debt collector.

27. Candace left the Message while acting on behalf of R&Y in accordance with R&Y's policies, practices and procedures as required pursuant to the training, supervision, and direction of JORDAN, STROEHLEIN and DOES.

28. Defendants caused the Message to be left in an attempt to collect a defaulted personal financial obligation ("Debt") allegedly owed by MELOSKIE.

29. R&Y obtained the Debt after it was in default.

VI. POLICIES AND PRACTICES COMPLAINED OF

30. It is the R&Y's policy and practice to leave voice messages for consumers without disclosing the purpose of the call or that Defendant is a debt collector.

31. Such policy and practice is reflected, in part, by several suits filed in the United

States District Court in which it was alleged that Defendant left messages without disclosing the purpose of the call or that Defendant is a debt collector. Those cases included:

31.01. Diane Marie Johnson v. Rubin and Yates LLC, et al., Case 08-cv-05869 (D. Minn.)

31.02. James Page v. Rubin and Yates LLC, Case 09-cv-07760 (C.D. Cal.)

31.03. Mary McNally v Rubin and Yates, LLC, Case 12-cv-1124 (E.D. Mich.)

31.04. Loralyn Drong v. Rubin and Yates, LLC, Case 12-cv-01927 (D. Minn.)

31.05. Jennifer Swetland v. Rubin and Yates, LLC, Case 13-cv-01147 (W.D. N.Y.)

32. Such policy and practice is in violation of 15 U.S.C. §§ 1692d(6) and 1692e(11).

VII. CLASS ALLEGATIONS

33. MELOSKIE brings this action individually and as a class action on behalf of all other persons similarly situated pursuant to Fed. R. Civ. P. 23.

34. Subject to discovery and further investigation which may cause Plaintiff to modify the following class definition at the time Plaintiff moves for class certification, Plaintiff defines the “Class” as follows:

> Excluding persons who, prior to the date this action is certified to proceed as a class action, either (a) died, (b) obtained a discharge in bankruptcy, (c) commenced an action in any court against Defendant alleging a violation of the Fair Debt Collection Practices Act, (d) signed a general release of claims against Defendant, or (e) is a Judge assigned to this case or is a member of such Judge’s staff or immediate family, the Class consists of:
>
> > Each natural person to whom Rubin and Yates LLC caused a telephone call to be placed during the Class Period to a telephone number with an area code assigned to New Jersey (including 201, 551, 609, 732, 848, 856, 862, 908, and 973) and left a voice message which failed to state that (A) the purpose of the call was to collect a debt and (B) either that (i) Rubin and Yates LLC is a debt collector or (ii) that the

> call was placed in an attempt to collect a debt and that any information obtained would be used for that purpose.

35. Subject to discovery and further investigation which may cause Plaintiff to modify the following definition of the "Class Claims" at the time Plaintiff moves for class certification, Plaintiff defines the Class Claims as:

> Claims arising under the Fair Debt Collection Practices Act based on the content of R&Y's voice message left in an attempt to collect a debt.

36. Subject to discovery and further investigation which may cause Plaintiff to modify the following definition of the "Class Period" at the time Plaintiff moves for class certification, Plaintiff defines the Class Period as:

> The continuous time period beginning on the date which is one year prior to the date on which this Complaint is filed and ending on the 35th day after such filing.

37. Based on discovery and further investigation (including, but not limited to, Defendant's disclosure of class size and net worth), Plaintiff may modify the alleged definitions of the Class, the Class Claims, and the Class Period, as well as seek class certification only as to particular issues as permitted under Fed. R. Civ. P. 23(c)(4).

38. The identity of each member of the Class is readily ascertainable from R&Y's records and those records of the entities on whose behalf R&Y was seeking to collect debts.

39. This action has been brought, and may properly be maintained, as a class action pursuant to the provisions of Fed. R. Civ. P. 23(a) because there is a well-defined community interest in the litigation in that:

> **39.01.** Plaintiff is informed and believes, and on that basis alleges, that the members of the Class are so *numerous* that joinder of all members would be impractical. On information and belief, there are more than 40 members of the Class.

39.02. *Common questions of law and fact* exist as to all members of the Class, the principal issues are whether Defendant's voice messages left for consumers in an attempt to collect a debt (i) failed to meaningfully identify the caller in violation of 15 U.S.C. § 1692d(6), or (ii) failed to disclose either that the caller is a debt collector or that the call was placed in an attempt to collect a debt and that any information obtained would be used for that purpose in violation of 15 U.S.C. § 1692e(11).

39.03. MELOSKIE's claims are *typical* of the claims of the class members. MELOSKIE and all members of the Class have claims arising out of the R&Y's common and uniform course of conduct with respect to leaving voice messages.

39.04. MELOSKIE will fairly and *adequately* protect the interests of the class members insofar as MELOSKIE has no interests that are adverse to the absent class members. MELOSKIE is committed to vigorously litigating this matter. MELOSKIE has also retained counsel experienced in handling consumer lawsuits, complex legal issues, and class actions. MELOSKIE and MELOSKIE's counsel have no interests which might cause them not to vigorously pursue the instant class action lawsuit.

40. Plaintiff alleges that this action may be maintained as a "B1a-class", a "B2-class", a "B3-class", or a hybrid of any two or all three types but, at the time of commencing this action, expects to seek certification class under Fed. R. Civ. P. 23(b)(3) in that the questions of law and fact common to members of the Class predominate over any questions affecting an individual member, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy because individual joinder of all members would be impracticable, class action treatment will permit a large number of similarly situated persons to prosecute their common claims in a single forum efficiently and without unnecessary duplication of effort and expense that individual actions would engender, an important public interest will be served by addressing the matter as a class action, substantial expenses to the litigants and to the judicial system will be realized, and difficulties are unlikely in the management of a class action.

VIII. CAUSE OF ACTION

41. MELOSKIE realleges and incorporates by reference the allegations in the preceding paragraphs of this Complaint.

42. MELOSKIE is a "consumer" within the meaning of 15 U.S.C. § 1692a(3).

43. R&Y is a "debt collector" within the meaning of 15 U.S.C. § 1692a(6).

44. JORDAN is a "debt collector" within the meaning of 15 U.S.C. § 1692a(6).

45. STROEHLEIN is a "debt collector" within the meaning of 15 U.S.C. § 1692a(6).

46. Each of the DOES is a "debt collector" within the meaning of 15 U.S.C. § 1692a(6).

47. The Message is a "communication" as defined by 15 U.S.C. § 1692a(2).

48. The Message was left by R&Y for MELOSKIE in an attempt to collect a "debt" within the meaning of 15 U.S.C. §1692a(5).

49. Having left the Message, R&Y, STROEHLEIN, CANDACE and each of the DOES violated the FDCPA, including, 15 U.S.C. §§ 1692d, 1692d(6), 1692e and 1692e(11), in that they:

49.01. Placed a telephone call without meaningful disclosure of the caller's identity in that the caller did not state that the purpose of the call as an attempt to collect a debt; and

49.02. Communicated with a consumer without disclosing either that the call was from a debt collector or that the caller was attempting to collect a debt and any information obtained would be used for that purpose.

50. Based on any one of those violations, each Defendant is liable to Plaintiff and the Class for statutory damages, attorney's fees and costs.

IX. PRAYER FOR RELIEF

51. WHEREFORE, Plaintiff, Elizabeth Meloskie, respectfully requests that the Court enter judgment against *each of* the Defendants, Rubin and Yates LLC, Cedrick A. Jordan also known as Cedric Jordan, Jason A. Stroehlein, and each of John Does 1-10 (fictitious names) who can be identified by name and served with process, as follows:

51.01. An order certifying that the Cause of Action may be maintained as a class pursuant to Fed. R. Civ. P. 23 including defining the class, defining the class claims, and appointing MELOSKIE as the class representative and the undersigned attorney as class counsel;

51.02. An award of statutory damages for MELOSKIE pursuant to 15 U.S.C. § 1692k(a)(2)(A) or § 1692k(a)(2)(B)(i);

51.03. An award of statutory damages for the Class pursuant to 15 U.S.C. § 1692k(a)(2)(B)(ii);

51.04. Attorney's fees, litigation expenses, and costs pursuant to 15 U.S.C. § 1692k(a)(B)(3); and

51.05. For such other and further relief as may be just and proper.

Philip D. Stern Attorney at Law, LLC
Attorneys for Plaintiff, Elizabeth Meloskie

s/Philip D. Stern

Dated: September 1, 2014 Philip D. Stern

X. CERTIFICATION PURSUANT TO LOCAL CIVIL RULE

Pursuant to L. Civ. R. 11.2, I hereby certify to the best of my knowledge that the matter in controversy is not the subject of any other action pending in any court or the subject of a pending arbitration proceeding, nor is any other action or arbitration proceeding contemplated. I further certify that I know of no party, other than putative class members, who should be joined in the action at this time.

s/Philip D. Stern

Dated: September 1, 2014 Philip D. Stern